



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel

FROM: *MWD* Mary W. Dove/Veneshe Ferebee-Vines *VFW*
Acting Secretary of the Commission

DATE: February 14, 2000

SUBJECT: Statement of Reasons for MUR 4689

Attached is a copy of the Statement of Reasons for MUR 4689 signed by Chairman Darryl R. Wold, Commissioner Lee Ann Elliott, Commissioner David M. Mason and Commissioner Karl J. Sandstrom.

This was received in the Commission Secretary's Office on Monday, February 14, 2000 at 12:19 p.m.

cc: Vincent J. Convery, Jr.
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FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
The Honorable Robert K. Dornan, et al.) **MUR 4689**

**STATEMENT OF REASONS OF
VICE CHAIRMAN DARRYL R. WOLD and
COMMISSIONERS LEE ANN ELLIOTT, DAVID M. MASON¹
and KARL J. SANDSTROM**

I. INTRODUCTION

On August 24, 1999, the Commission considered the General Counsel's Report to find reason to believe that the Honorable Robert K. Dornan, Salem Radio Networks and ABC Radio Networks violated 2 U.S.C. §441b. For the reasons set forth below, we rejected the recommendations.

This case involved the broadcast of several nationally-syndicated radio shows guest hosted by former Congressman Dornan. The question for the Commission was whether these constituted prohibited corporate contributions from the stations, to Mr. Dornan, in violation of 2 U.S.C. §441b.

The General Counsel argued that the purpose of the broadcasts was, at least in part, to influence Mr. Dornan's election to federal office, and that the stations, by allowing him to broadcast without restriction as to the content of his show, had made prohibited corporate contributions. (*First General Counsel's Report*, pp.11-18.)

As this case involved the broadcast of allegedly federal election influencing material, we began our analysis by examining the facts in light of the "press exemption."²

¹ See additional Statement of Commissioner Mason addressing the issue in this matter in more detail.
² The respondents raised the defense that their activity was protected by the "press exemption" found in §431(9)(B)(i) of the Act, which has its foundation in the First Amendment to the Constitution (see HR Rep. No. 93-1239, p. 4 (1974), explaining the purpose of adopting this provision in the Act). An "expenditure" as defined in the FECA does not include "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such

After analyzing the facts and applying the relevant law, we concluded that the press exemption was applicable and that no prohibited corporate contributions were made.

II. ANALYSIS

As the General Counsel noted in his report, the two respondents responsible for the broadcast of the programs were press entities as set forth in the press exemption. (FGC Report, p. 20.)

Courts have ruled that where a press entity's activity is at issue, the FEC must first determine whether the press exemption is available. Only if we determine the exemption is not applicable can the Commission examine the activity itself to determine if there was a violation of the Act. As the court said in *FEC v. Phillips Publishing, Inc.* (D.D.C., 1981) 517 F.Supp. 1308, at 1313:

[T]he initial inquiry is limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. [Citations omitted.] If the press entity is not owned or controlled by any political party or candidate and it is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint.³

There is no indication that the press entities involved here were owned or controlled by a political party or a candidate (FGC Report, p. 20), so the first prong of the initial inquiry is satisfied.

The second prong is also satisfied because it appears that the entities were acting in their capacity as members of the media in presenting the programs in question. The programs at issue are those that featured Mr. Dornan as the guest host on three different radio talk shows in 1997. Each of the three talk shows was nationally syndicated and ran in most of the top radio markets. The shows generally featured commentary on political topics, interviews with political figures, and interaction with callers. There is no indication that the formats, distribution, or other aspects of production were any different when Mr. Dornan was a guest host than they were when the regular host was present. (Compare *FEC v. Massachusetts Citizens for Life* (1986) 479 U.S. 238, 250-251, holding that a "special edition" of a newspaper was not entitled to the press exemption because of its substantial difference in production and distribution from the regular editions of that

facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. §431(9)(B)(i).

³ *FEC v. Phillips Publishing, Inc.* drew this two-step inquiry from *Reader's Digest Association, Inc. v. FEC*, (D.D.C. 1981) 509 F.Supp. 1210, which was cited with approval in *FEC v. Machinists Non-Partisan Political League* (D.C. Cir. 1981) 655 F. 2d 380, at 396. Advisory Opinions 1982-44, 1996-16, 1996-41, 1996-48 and 1998-17 cited these authorities. See also *MCFL*, 469 US 238, 250-251 adopting a similar two-step process in analyzing the FECA's press exemption.

newspaper.) It therefore appears that the programs were within the press exemption provided in §431(9)(B)(i) for "commentary."⁴

Because the result of these two determinations is that this Commission lacks subject matter jurisdiction, we are unconvinced that the identity or possible candidate status of the host-commentator is material to the outcome of this case. Even if we admit those considerations, however, the fact that Mr. Dorman was the guest host does not change the foregoing analysis, or the conclusion that the press entities were acting as such in presenting the programs in question. There is no evidence that Mr. Dorman was invited to be the guest host because of any alleged or possible status as a candidate at a future election. The media respondents, in fact, assert the contrary: That Mr. Dorman has worked for other radio and television shows in the past, including as a radio talk show host; and that he was employed as a guest host for business reasons and not because of any possible status as a candidate. In fact, it does not appear that Mr. Dorman was a candidate at the time of at least most of the programs in question. Mr. Dorman had been a candidate in the 1996 general election, at which he was defeated. The programs in question were broadcast on various dates in March and April, 1997, and on October 15, 1997. Mr. Dorman first filed a statement of candidacy on October 8, 1997 for his candidacy in the 1998 election. The Counsel's Report describes the extensive fundraising Mr. Dorman continued to engage in following his defeat in the November, 1996 election, and continuing throughout 1997, but that appears (from amended campaign statements) to have been for the purpose of paying for a recount of and challenge to the results of the 1996 election. The fact that Mr. Dorman filed a statement of candidacy one week before his last appearance on a radio program, and more than six months before the 1998 primary election, does not alter his pre-existing practice of serving as a guest host into an expenditure for the purpose of influencing a federal election.

Because it does not appear that Mr. Dorman was invited to serve as a guest host because of any possible candidacy, the Commission's analysis in three advisory opinions relied on by the General Counsel's Report, Advisory Opinions 1996-16, 1996-41, and 1996-48, in which the Commission reviewed proposed formats in determining whether particular programs featuring candidates fell within the press exemption, is not applicable to this matter. (See FGC Report, p. 19.) In addition, the fact that the Commission approved certain program formats as presented in advisory opinion requests cannot be construed as imposing format restrictions on broadcasters generally.

Since it appears that the activities complained of are protected by the press exemption, the Commission lacks subject matter jurisdiction over the activity and is

⁴ This conclusion is consistent with that which the Commission reached in Advisory Opinion 1982-44: "Although the statute and regulations do not define 'commentary,' the Commission is of the view that commentary cannot be limited to the broadcaster. The exemption already includes the term 'editorial' which applies specifically to the broadcaster's point of view. In the opinion of the Commission, 'commentary' was intended to allow the third persons access to the media to discuss issues. The statute and regulations do not define the issues permitted to be discussed or the format in which they are to be presented under the 'commentary' exemption nor do they set a time limit as to the length of the commentary."

therefore precluded from proceeding further against the respondents on account of that activity, including inquiring further into the contents of Mr. Dornan's speech on the programs. (*FEC v. Phillips Publishing, Inc.*, *supra*, at 1313; *Reader's Digest Association v. FEC*, *supra*, at 1214-1215; *see also FEC v. Machinists Non-Partisan League*, *supra*, at 396-397.) Allegations of what Mr. Dornan said on the programs on which he was a guest host, therefore, are also irrelevant to the Commission's decision.

Because the activity was within the scope of the press exemption in §431(9)(B)(i), it does not constitute an expenditure under the Act.

In addition, even if we had determined the press exemption was not applicable, for reasons of prosecutorial discretion we would have declined to pursue this matter. There was no indication of any intention on the part of any of the respondents to give Mr. Dornan a platform for a possible future candidacy for office. Mr. Dornan was a radio commentator before running for office, and continues to broadcast and appear on nationally syndicated programs. He had made only a limited number of appearances as a guest host on the programs at issue, and the transcripts of the broadcasts revealed no specific discussions of Mr. Dornan's current or future candidacy for election to federal office. A successful prosecution of this matter would depend on a detailed *affidavit*-the-fact review of the content of the broadcasts to determine whether sufficient references to his possible candidacy were made to constitute a communication for the purpose of influencing his election. Given these circumstances, we feel that it is unlikely that a prosecution would be successful, and that the First Amendment interests in protecting speech on public issues outweighs any interests of the FECA inadvertently implicated by that speech.

For the above reasons, we rejected the recommendations of the General Counsel and determined there was no reason to believe the stations or Mr. Dornan had violated the Act.

Darryl R. Wold 12/20/99 Lee Ann Elliott 12/20/99
Vice Chairman Darryl R. Wold Date Commissioner Lee Ann Elliott Date

David M. Mason 12/20/99 Karl J. Sandstrom 12/20/99
Commissioner David M. Mason Date Commissioner Karl J. Sandstrom Date